

72251-4

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January 7, 2016
Court of Appeals
Division I
State of Washington

72251-4

NO. 72251-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

HOWARD ROSS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESii

A. ARGUMENT IN REPLY 1

1. The court was collaterally estopped from finding Mr. Ross guilty of possession of a firearm..... 1

2. The inconsistent verdicts of the jury and judicial factfinder must be resolved in Mr. Ross’ favor.....5

3. There was insufficient of the evidence Mr. Ross possessed a firearm..... 7

B. CONCLUSION.....9

TABLE OF AUTHORITIES

Cases

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) 2, 4

Galloway v. State, 371 Md. 379, 809 A.2d 653, 675 (2002)..... 6

Haynesworth v. United States, 473 A.2d 366 (D.C.1984)..... 6

In re Moi, 360 P.3d 811 (Wash. 2015) 2, 5

Nakatani v. State, 109 Wn. App. 622, 36 P.3d 1116 (2001) 8

People v. Vaughn, 409 Mich. 463, 295 N.W.2d 354 (1980) 6

People v. Williams, 99 Mich.App. 463, 297 N.W.2d 702 (1980) 6

State v. Faust, 93 Wn. App. 373, 967 P.2d 1284 (1998)..... 8

State v. Pam, 98 Wn.2d 748, 659 P.2d 454 (1983), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988)..... 7

U.S. v. Duz-Mor Diagnostic Laboratory, Inc., 650 F.2d 223 (9th Cir.1981) 6

United States v. Maybury, 274 F.2d 899 (2d Cir. 1960)..... 6, 7

Statutes

RCW 9.41.010 7

Rules

CrR 6.16..... 3

Constitutional Provisions

Const. art. I, § 9 2

U.S. Const. amend. 14 2

U.S. Const. amends. 5..... 2

A. ARGUMENT IN REPLY

In its argument to the court on firearm possession, the State made clear “the crux of this crime [the assault] is that it was committed with a firearm.” 7 RP 895. The only argument the State ever made with respect to whether Mr. Ross was guilty of possession of a firearm was the State’s assertion that Mr. Ross “ultimately shot and injured Ken Jones with it [the firearm].” 8 RP 895. No evidence was ever introduced at trial, nor any theory put forward that Mr. Ross acted in concert with another person or possessed a different weapon than the one used to assault Mr. Jones. The clear rejection of Mr. Jones testimony and the final judgment of the jury in rendering that verdict required the court to find Mr. Ross not guilty of the remaining firearms charge. This court should reverse Mr. Ross’ conviction as inconsistent with the jury’s finding of not guilty with respect to the assault of Mr. Jones.

1. The final judgment of the jury collaterally estopped the trial court from finding Mr. Ross guilty of possession of a firearm.

Washington’s Supreme Court recently affirmed the principle that “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between

the same parties in any future lawsuit,” including a criminal prosecution. *In re Moi*, 360 P.3d 811, 813 (Wash. 2015) (quoting *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970)); see also, U.S. Const. amends. 5, 14; Const. art. I, § 9. *Moi* presents a similar issue as here. Mr. Moi was tried for murder and possession of a firearm. *Moi*, 360 P.3d at 812. The charges were severed and the firearm charge was tried to the court, simultaneously with the murder charges being heard by the jury. *Id.* The jury was unable to reach a verdict on the murder charge and a mistrial was declared. *Id.* Subsequently, the trial court found Mr. Moi not guilty of the firearm possession. *Id.* In Mr. Moi’s second trial, a jury found him guilty of murder. *Id.* The Supreme Court reversed Mr. Moi’s conviction, finding the State was collaterally estopped from trying Mr. Moi on the murder charge. *Id.* at 816.

The same principles apply here. When the jury issued its general and special verdicts, it found beyond a reasonable doubt Mr. Ross was not in possession of a firearm. 8 RP 907. The jury was specifically instructed that the assault on Mr. Jones “(a) was committed with a firearm or by a force or means likely to produce great bodily harm or death; or (b) resulted in the infliction of great bodily harm.” CP 41.

They were further instructed on the definition of firearm, consistent with the definition required for unlawful possession. CP 44. The special verdict form made clear “the State must prove beyond a reasonable doubt that the defendant was armed with a firearm.” CP 48. The jury found both that Mr. Ross was not guilty of assault in the first degree and that he was not armed with a firearm at the time of the commission of the assault. CP 51-52.

The State argues in its brief that collateral estoppel does not apply because the inconsistent verdicts of the court and jury were rendered in the same proceedings. State’s Brief at 9. This was not the case. While the two trials were tried simultaneously, they were not tried together. Mr. Ross signed a waiver of jury only with respect to the firearm charge. 3 RP 201. Both parties had an opportunity to open and close separately to the court. The State took advantage of this opportunity, again emphasizing the evidence of the “crux” of the evidence Mr. Ross possessed the firearm. 7 RP 895.

This argument also fails to address the final verdict rendered by the jury prior to the court’s verdict. 8 RP 907; 8 RP 914. Once the jury issued its verdict on both the general and special verdict, they became final. CrR 6.16(2). The trial court was estopped from rendering a

verdict inconsistent with the verdict of the jury. This Court must find the verdict rendered by the jury was final. Consistent with principles of “realism and rationality”, this Court must then decide what issue or issues the prior fact-finder decided. *Ashe*, 397 U.S. at 444. Under this analysis, the State should have been barred from continuing to litigate an issue already rendered final by the jury’s verdict. As in *Ashe*, it is “constitutionally no different” to estop the State from continuing to litigate an issue which they failed to prove to a jury and would have been prevented from trying in a second trial. *Id.*

This court should reject the trial court’s “hypertechnical” analysis in finding Mr. Ross guilty of unlawful possession of a firearm. *See, Ashe*, 397 U.S. at 444. This case involves a clear course of conduct involving one firearm. There are no allegations there was a second assailant, never mind a second firearm. To the contrary, at no time did the State ever allege the firearm used to assault Mr. Jones was not the same firearm Mr. Ross was alleged to have possessed all evening. *See, e.g.* 7 RP 861 (the “firearm pretty much is the crime here because it's the mechanism of injury”).

The only way to reach the verdict the trial court did is to have found some other person assaulted Mr. Jones, a theory never argued by

the State. The State's theory was always that there was only one assailant armed with one firearm. When the jury found Mr. Ross not guilty of assault, they also considered the question of whether he had been armed with a firearm, again finding beyond a reasonable doubt that he was not. The court created an absurd result that was contrary to the argument of the State and the evidence when it determined the "gun that was in the vehicle" supported finding Mr. Ross guilty of possession of a firearm and then did not make a finding the gun was or was not the same gun used to assault Mr. Jones. *See* 8 RP 920.

Enforcing the collateral estoppel doctrine will not result in an injustice. *Moi*, 360 P.3d at 815. Instead, it creates consistent verdicts between the jury and the court. This Court should find no injustice would be created by enforcing the collateral estoppel doctrine. Instead, this Court should find that the trial court was collaterally estopped from finding Mr. Ross guilty of possession of a firearm and should dismiss count 2.

2. The inconsistent verdicts of the jury and judicial factfinder must be resolved in Mr. Ross' favor.

Unlike jurors, there is no need to permit judicial officers to issue inconsistent verdicts. *United States v. Maybury*, 274 F.2d 899, 903 (2d Cir. 1960). Under an experience and logic analysis, this Court should

rule consistently with *Marbury* that judicial officers may not “indulge in ‘vagaries’ in the disposition of criminal charges” and that the justifications for allowing inconsistent verdicts by juries do not apply when the fact finder is a judge. *Marbury*, 274 F.2d at 903. Where the inconsistency is created by the trial court when it renders a verdict inconsistent with the verdict rendered by the jury, reversal of the court’s verdicts is required. *Galloway v. State*, 371 Md. 379, 416, 809 A.2d 653, 675 (2002). This analysis has been adopted by other courts examining this issue and should be adopted in Washington as well. *See, e.g., U.S. v. Duz-Mor Diagnostic Laboratory, Inc.*, 650 F.2d 223, 226 (9th Cir.1981); *Haynesworth v. United States*, 473 A.2d 366, 368 (D.C.1984); *People v. Vaughn*, 409 Mich. 463, 295 N.W.2d 354 (1980); *People v. Williams*, 99 Mich.App. 463, 297 N.W.2d 702 (1980).

The *Galloway* court makes clear that to approve an inconsistent verdict issued by a judicial officer in a bifurcated trial “would undermine the historic role of the jury as the arbiter of questions put to it.” 371 Md. at 406. Respect for the law or for the court is not enhanced by allowing a judge to indulge in the same compromises a jury may make in rendering its verdict. *Marbury*, 274 F.2d at 903. Instead,

Galloway cautions that approving inconsistent verdicts rendered by a trial judge in a bifurcated trial would authorize “a practice that would permit the State to achieve a judgement of conviction that overrides a jury’s finding of acquittal. 371 Md. at 676. Upon receiving the jury’s verdict, the trial court should have dismissed count 2. This court should find the verdicts are inconsistent and, in order to give effect to the unanimous verdict of the jury, dismiss count 2.

3. There was insufficient of the evidence Mr. Ross possessed a firearm.

An essential element of possession of a firearm is that it is a weapon or device from which a projectile may be fired by an explosive such as gunpowder. RCW 9.41.010 (9). Sufficient evidence must be presented to the fact finder for it to determine that the object is a true firearm and not a gun-like object incapable of being fired. *State v. Pam*, 98 Wn.2d 748, 755, 659 P.2d 454 (1983), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988). Whether an object is a “firearm” involves a question of statutory interpretation that is reviewed de novo. *Nakatani v. State*, 109 Wn. App. 622, 625, 36 P.3d 1116 (2001); *see also State v. Faust*, 93 Wn. App. 373, 376, 967 P.2d 1284 (1998).

Had the jury credited Mr. Jones testimony and found Mr. Ross guilty of assault in the first degree, there would have been sufficient evidence to establish possession of a firearm as well. When the jury discredited this evidence in finding him not guilty and by making a special finding he was not in possession of a firearm, the court was forced to ignore the clear message the jurors sent. The court could not find Mr. Ross guilty without ignoring the decision of the jury, instead relying upon insufficient evidence of his guilt.

These findings are insufficient to find that Mr. Ross was in possession of an operable firearm on the night in question. CP 60. No firearm was ever recovered, there was no evidence that a “second firearm” was ever discharged, and there was no testimony presented that would indicate a “second firearm” was capable of being discharged, let alone existed at all. *Id.* at 60-61.

In order to find sufficient evidence of possession and operability, the court must reject the clear findings of the jury that Mr. Ross did not assault Mr. Jones and did not possess a firearm in the commission of the assault. CP 50-51. Even when this evidence is ignored, insufficient evidence exists to establish the operability of the

firearm the State alleged Mr. Ross possessed. Because of this insufficiency, this court should dismiss count 2.

B. CONCLUSION

The court was collaterally estopped from issuing the verdict that it did, which was inconsistent with the findings of the jury. Given the jury's unanimous determination that Mr. Ross was not guilty of assault and did not commit the crime with a firearm, there was insufficient evidence to prove beyond a reasonable doubt that Mr. Ross was in possession of a firearm. This Court should dismiss the unlawful possession of a firearm charge.

DATED this 7th day of January 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
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v.)	
)	
HOWARD ROSS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF JANUARY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF JANUARY, 2016.

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